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**IN THE SUPREME COURT
OF
THE UNITED STATES**

WASHINGTON 25, D. C.

OCTOBER TERM, 1961

No. 158

WILLARD CARNLEY,
Petitioner,

vs.

H. G. COCHRAN, JR.,
Director of the Division
of Corrections, Florida,
Respondent.

**On Writ of Certiorari from the
Supreme Court of the State of Florida**

BRIEF OF RESPONDENT

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Chapter 801

Section 801.03 (1) (b)

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BRIEF OF RESPONDENT

CONSTITUTIONAL PROVISIONS

The following constitutional provisions are added to supplement the constitutional and statutory provisions submitted by the petitioner's brief:

Amendment V of the United States Constitution
Amendment VI of the United States Constitution

QUESTIONS PRESENTED

I

WHETHER PETITIONER MET THE BURDEN OF PROVING THAT ANY RIGHT TO COUNSEL WAS NOT WAIVED?

II

WHETHER THE UNEDUCATED PETITIONER WHO IS OF NORMAL INTELLIGENCE WAS DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW WHEN CONVICTED OF A FELONY WITHOUT BEING OFFERED COUNSEL WHEN THE PROCEEDINGS WERE OTHERWISE FAIR?

STATEMENT OF THE CASE

The statement of the case submitted by petitioner is essentially accurate. It should be added that the Florida Supreme Court found from the certified transcript of testimony attached to respondent's return (R. 31), that petitioner actively participated in the conduct of the trial by interrogating witnesses, by making opening statements to the jury, and by making closing arguments to the jury; and, further, found from such transcript of testimony that the trial court instructed petitioner in regards to correct trial procedure and as to his constitutional rights (R. 74).

SUMMARY OF ARGUMENT

The submitted record of the trial below (R. 31-69) negates petitioner's allegations that he requested counsel;

and petitioner has, therefore, failed to meet the burden of proving by the preponderance of the evidence that he did not waive his alleged constitutional right to counsel (*Johnson vs. Zerbst*, 304 U. S. 458, Text 468, 82 L. ed. 1461, Text 1468, 58 S. Ct. 1019). Even if arguendo, the petitioner did not waive his right to counsel the court's failure to appoint counsel, when unrequested to do so by petitioner, did not deny petitioner due process of law because the over-all proceedings were carried out in a fair and unbiased manner.

Although petitioner alleges that complex legal questions were involved in his trial, which questions might have been more ably raised by counsel, such point is rendered moot by the fact that the complexities were resolved in petitioner's favor. The fallacy of holding that the *Fourteenth Amendment* requires the appointment of counsel in criminal cases is revealed by the resulting absurdity that since loss of property and liberty are equally protected by the *Fourteenth Amendment*, the holding would necessitate the appointment of counsel in civil cases where indigent defendants were faced with property loss.

ARGUMENT

Point I

PETITIONER DID NOT PROVE BY THE PREPONDERANCE OF THE EVIDENCE THAT HE DID NOT WAIVE COUNSEL.

In the case of *Johnson vs. Zerbst*, supra, the Supreme Court of the United States held that in criminal cases originating in the federal courts, petitioner must prove by the preponderance of the evidence that he did not competently and intelligently waive his right to counsel in order to be entitled to a reversal of the Federal District

Court's opinion on the ground that the petitioner was not furnished with counsel. Such case or proposition was cited with favor in *Moore vs. Michigan*, 355 U. S. 155, 2 L. ed. 2d 167, 78 S. Ct. 191. In the case of *Buckner vs. Hudspeth* (1939 Cir. Ct. App. 10th Kansas, 105 F. 2d 396), cert. den. 308 U. S. 552, 84 L. ed. 465, 60 S. Ct. 99, petitioner was held to have waived his right to counsel by failing to request counsel even though he was not informed of such right by the court. The Supreme Court of the State of Florida held below that petitioner presumably waived his right to counsel (R. 74, 75) and such holding is in accord with the *Buckner vs. Hudspeth*, supra, decision. Certainly, if such presumption may be, or could have been entertained in a federal court, such presumption would be even more logically applied in state courts because a state court does not have the strict duty of furnishing counsel to indigent defendants in criminal cases that is required of the federal courts by the Sixth Amendment.

Point II

FAILURE TO APPOINT COUNSEL FOR AN ILLITERATE BUT OTHERWISE MENTALLY COMPETENT PETITIONER UNDER CIRCUMSTANCES WHERE COUNSEL WAS NOT REQUESTED DOES NOT DENY THE PETITIONER HIS LIBERTY WITHOUT DUE PROCESS OF LAW WHEN THERE IS NO OTHER PREJUDICIAL FACTOR IN PETITIONER'S FAVOR.

The court explained in detail to petitioner, at various stages of the trial, those legal rights to which he was entitled (R. 31, 32, 41, 47, 48, 52, 53, 57, 60, 61). Petitioner actively participated in the conduct of the trial by interrogating witnesses against himself and by making opening and closing statements to the jury (R. 32, 41, 48, 58, 59, 62).

In the case of *Betts vs. Brady*, 316 U. S. 455, 86 L. ed. 1595, 62 S. Ct. 1252, this Court held that the requirements of counsel inherent in the *Fourteenth Amendment's* due process clause was not as rigid as the requirements in the *Sixth Amendment* and that, therefore, the *Fourteenth Amendment* was not violated by a court's refusal to appoint counsel to a defendant even though requested to do so and even though such defendant was a farmhand of similar rural background to the petitioner in the present case. The *Betts case*, *supra*, so closely parallels the present case that a holding adverse to respondent in the present case would necessitate an overruling of the *Betts case*, *supra*. However, a ruling in favor of respondent in the present case would not necessarily support the holding of *Betts vs. Brady*, *supra*, because such ruling could be on the ground that petitioner has not proven by the preponderance of the evidence that he did not waive counsel.

The rationale in *Betts vs. Brady*, *supra*, points out that the common law permitted defendant to employ counsel but did not require that the court appoint counsel when the defendant was unable to hire such counsel. It is the feeling of the respondent that the *Fourteenth Amendment* should be interpreted in light of the common law rule indicated by *Betts vs. Brady*, *supra*, and thus be held to guarantee that a defendant may hire counsel for himself but not to guarantee appointed counsel unless there are factors involved other than the poverty of the defendant.

If this Court were to interpret the *Fourteenth Amendment* due process of law provision as placing on the state the burden of appointing counsel in the present case, such interpretation would necessitate the state's appointing counsel not only in criminal cases but also civil cases. The *Fourteenth Amendment* requires due process of law in depriving one of life, liberty or property. Life and liberty

are the factors involved in a criminal case. However, property is given equal standing in the *Fourteenth Amendment*. If the court were to fail to appoint counsel for an indigent litigant in a civil case that involves the property rights of such litigant, such failure to appoint counsel would have to constitute state action in denial of due process of law under the theory presented in *Shelley vs. Kramer*, 334 U. S. 1, 92 L ed. 1161, 68 S. Ct. 836. Therefore, the absurd result of holding the *Fourteenth Amendment* to require the state to appoint counsel in a criminal trial is that the state is required to appoint counsel in trials involving property rights while the federal government who is governed by the *Sixth Amendment* in the appointment of counsel continues its course free of such responsibility to appoint counsel in civil cases for indigent litigants who are in danger of losing property rights. This absurd result reveals that the proposition that the state must furnish counsel to indigent defendants is fallacious and supports the soundness of the rule requiring that the over-all proceedings be examined to ascertain whether they are within the limits of fairness required by the due process clause of the *Fourteenth Amendment*.

The rule that the characteristic of the over-all proceedings should be controlling rather than the fact of counsel's absence is supported by *Gallegos vs. Nebraska* (1951), 342 U. S. 55, Text 64, 96 L ed. 86, Text 94, 72 S. Ct. 141, where in the failure to appoint counsel for an indigent, ignorant defendant was held not to violate due process when the over-all proceedings were fair. It should also be noted that the *Gallegos* case, *supra*, and *Beits vs. Brady*, *supra*, held that there must be circumstances in excess of the ignorance as well as the poverty of the defendant before failure to appoint counsel will violate the requirements of the *Fourteenth Amendment*. See also *Quicksall vs. Michigan* (1950), 339 U. S. 660, 94 L ed. 1188, 70 S. Ct. 910.

If the defendant has not reached his maturity (*Cash vs. Culver*, 358 U. S. 633, 3 L ed. 2d 557, 79 S. Ct. 432), or has a diagnosed mental deficiency such as imbecility (*McNeal vs. Culver*, 362 U. S. 910, 5 L ed. 2d 445, 81 S. Ct. 413), then such defendant would logically be entitled to counsel in a criminal case in the same manner as the court might appoint a guardian to assure against such defendant losing his property without due process of law. However, if the defendant is one who though uneducated might nevertheless serve in a position of public office (the present petitioner is qualified under the United States Constitution to be a candidate for president of the United States), vote, or act as a juror in convicting others, then such defendant should not be entitled to appointment of counsel in a criminal case any more than he would be entitled to appointment of counsel in a civil manner. Of course, as pointed out in *Chandler vs. Fretag*, 348 U.S. 3, 99 L ed. 4. S. Ct. 1, every defendant in a criminal case would have the same right to employ counsel and would have the opportunity to consult with such counsel in the same manner that a litigant would have the right to employ counsel in a civil case. See *Reynolds vs. Cochran*, 365 U. S. 525, 5 L ed. 2d 754, 81 S. Ct. 723. Of course, the defendant is entitled to a fair trial.

There were complexities involved in the proceeding as was so ably pointed out by petitioner's brief. However, the complexities raised were resolved in petitioner's favor. The issue that the two counts on which petitioner was convicted might possibly constitute only one crime was resolved in petitioner's favor when the court sentenced him to a term within the upper limits of the sentence for either of the counts (R. 7, 75). The issue that one of the counts might have constituted a crime within the terms of *Chapter 801, Florida Statutes*, was resolved in petitioner's favor when the court sentenced him to a term within the upper limits

of that count which was not subject to any attack. On Pages 17 and 18 of petitioner's brief, he referred to the importance of granting certain constitutional rights to defendants in cases involving the uncorroborated testimony of the prosecuting witness. The court should note that the testimony of Carol Jean Carnley is well substantiated by that of her brother, J. W. Carnley (R. 43-47). The case of *Bute vs. Illinois*, 333 U. S. 640, 92 L. ed. 986, 68 S. Ct. 763 presented a charge identical to the present one to the United States Supreme Court. The Supreme Court in the *Bute* case, *supra*, found that the charge of taking indecent liberties with a girl of fifteen was not so complex as to require the appointment of counsel to the indigent defendant. As has already been pointed out, the complexities arising from the presence of two counts in the present charge that might distinguish such charge from *Bute vs. Illinois*, *supra*, were resolved in petitioner's favor when the court sentenced him to a term of six months to twenty years rather than to two consecutive terms of twenty years on each of the counts on which the petitioner was convicted.

As pointed out by counsel, the judge, under *Section 801.03 (1) (b), Florida Statutes*, could have committed petitioner for psychiatric treatment and rehabilitation and stayed the criminal proceedings. However, there is no inference in *Section 801.03*, *supra*, that the commitment should be in lieu of criminal punishment but, rather the inference is that such commitment shall be a prelude to such criminal punishment. The rendering of psychiatric treatment is completely within the discretion of the judge and it would appear that counsel could have in no way facilitated the exercise of such discretion. Since the rendering of psychiatric treatment was dependent on the court's discretion, there was no right in petitioner to such treatment which could have been protected by competent professional counsel.

It is therefore submitted that there is no element of complexity existing in the present case which might have been decided more in favor of petitioner than was done so at petitioner's trial.

The transcript of the testimony of the trial (R. 31-69) reflects that the lower court was completely fair in its decorum to petitioner and guided petitioner by vocal direction through the criminal procedure necessary to present his defense.

The claim of denial of due process is based solely on the proposition that the court did not appoint counsel even though not requested to do so by the illiterate petitioner. Such fact in itself standing alone but surrounded by circumstances of a completely fair and unbiased trial shown by the transcript of record does not justify requiring the state that high degree of decorum which this sovereign has chosen to place on itself by a development through court decision of the terms of the *Sixth Amendment*.

CONCLUSION

It is submitted that because petitioner has failed to meet the burden of showing that he did not effectively waive counsel, the judgment of the Supreme Court of Florida should be affirmed.

It is further submitted that because petitioner's lack of counsel stands alone without any apparent unfairness in the proceedings, and because the record supports the proposition that the trial against petitioner was rendered in a completely fair manner, this Court should sustain the holding of the Florida Supreme Court and the procedure followed in the trial court.

Respectfully submitted,

H. G. COCHRAN, JR.,
Director of the Division
of Corrections, Florida,
Respondent.

.....
RICHARD W. ERVIN
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Assistant Attorney General
Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Brief of Respondent has been furnished to the Honorable Harold A. Ward, III, Attorney at Law, Winderweedle, Haines, Hunter and Ward, P. O. Box 257, Winter Park, Florida, by mail, day of October, 1961.

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Counsel for Respondent